

2019 ADVANCED DUI TRIAL ADVOCACY

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INTOXILYZER 9000 INTRODUCTION

Presented by:

Beth Barnes

TSRP, Assistant Phoenix City Prosecutor
Phoenix City Prosecutor's Office

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

Intoxilyzer 9000 and Breath Test Law Reference Sheet

- DPS Crime Lab is about to start using Intoxilyzer 9000s
- Officers will need to be certified on the 9000 (even if already certified on the 8000) if admission is through the breath test statute – otherwise use Rule 702
- When introduced, the new instruments will be phased in
 - Introduction will be gradual at first
 - Intoxilyzer 8000s and 9000s will both be in service
- The Intoxilyzer 9000 is extremely automated for the officer operator
- It is much easier for the suspect to blow into the Intoxilyzer 9000
- There are separate checklists for the 8000s and the 9000s
- The operator checklist for the Intoxilyzer 9000 is streamlined
- The protocol for the 9000 should ensure the officer conducts a proper 15-minute deprivation period
- The 9000 prompts officer to remove the mouth piece after each breath sample
- When a gas tank is changed on the Intoxilyzer 9000, it will automatically start a calibration check on the new tank
- The Intoxilyzer 9000 instruments will give a notice before the annual preventative maintenance is due and then shut off until it is performed.
- Arizona Intoxilyzer 9000 instruments may have any or all of the following:
 - Magnetic swipe card
 - Barcode scanner
 - Touch screen keyboard
 - External USB keyboard
- Battery backup is built into the Arizona Intoxilyzer 9000 models
- Intoxilyzer 9000s will have LAN connectivity
- NIST traceable dry gas simulator

Intoxilyzer 9000 Features

- Multiple wavelength technology
- Power supply can be 12 VDC, 110 VAC, or 220 VAC
- No moving parts other than the cooling fan
- Standby mode to preserve the life of the light source
- Card swipe or 2-D for the operator cards and driver's licenses
- Heated breath hose and sample chamber prevents condensation
 - controlled and monitored by the internal electronics
- Internal battery backup

Documentation for the Intoxilyzer 9000

- Breath Test Print Card
- Operator checklist
- 31- day check (no 90-day check – they will be combined)
 - Exhibit I-2
 - Periodic Maintenance, Calibration, and Standard Quality Assurance Procedure
- Other maintenance records will be available from the DPS lab
- Documentation for the 8000s will stay the same

Intoxilyzer 9000



Specifications From CMI

Multiple Wavelength

Analyzes sample using multiple IR wavelengths

Range

0.000 to 0.650 gram/210 liters to 0.650 gram/210 liters

Accuracy

±3% or ± .003 grams/210 liters (whichever is greater)

Precision

Standard deviation of .003 or better

Operating System

Microsoft Windows CE 6.0

Approximate Dimensions

	w/Gas	w/o Gas
Length	19"	14 ½"
Width	14"	14"
Height (lowered)	6 ¾"	6 ¾"

Weight

w/Gas	w/o Gas
12 lbs.	10 lbs.

External Printer

USB compatible PCL LaserJet

Memory

128 MB RAM, 512 MB Nand Flash, Optional Internal SD Card slot for memory expansion up to 32 GB.

Warranty

Instrument has a standard one (1) year warranty.

Intoxilyzer 9000 Checklist

**EXHIBIT I-1
OPERATIONAL CHECKLIST
STANDARD OPERATIONAL PROCEDURE
ARIZONA DEPARTMENT OF PUBLIC SAFETY
INTOXILYZER MODEL 9000
DUPLICATE BREATH TEST**

SUBJECT NAME _____ DATE _____
AGENCY _____ OPERATOR & BADGE _____
INTOXILYZER SERIAL # _____ DEPRIVATION BY _____

- ☐ 1. Ensure proper deprivation period.
- ☐ 2. Push the start button on the screen
- ☐ 3. Follow automated prompts on the instrument display

Note: Duplicate breath tests shall be administered at intervals of not less than 5 minutes nor more than 10 minutes apart and the two consecutive tests shall agree within 0.02 alcohol concentration.

COMMENTS:

SIGNATURE _____

Breath Test Printout (External Printer)

Arizona Forensic Breath Alcohol Analytical Report

INSTRUMENT INFORMATION

Analytical Instrument: Intoxilyzer 9000
Serial Number: 90-002607
Software Version: .9439.00.20
Analytical Report Number: 26070907180104

QAS: GREEN, RICHARD M.
QAS Permit #: 1111111
Agency: CMI
Last 31-Day Check: 08/07/2018
Last Annual Maintenance: 06/11/2018

SUBJECT INFORMATION

Test Date: 08/07/2018
Name: TEST, TEST
Driver's License #:
Gender: V
Date of Birth: 09/09/1999
Age: 18

Weight: 160
State of Issue:
Driver's License Expiration:
Deprivation Start Time: 09:30
15 - Minute Deprivation: Yes

OPERATOR INFORMATION

Operator Name: OPERATOR, LEVEL ONE M.
Agency: TRAINING CLASS

Permit #: 1020304

STANDARD INFORMATION

Standard Value: 0.100
Standard Lot #: 29017100A6
Expiration Date: 12/05/2019
Bottle #: 005
Last Changed By: POWERS, MARY M.
Permit #: 1234567

Test	g/210L	Time
Air Blank	0.000	09:47:34
Diagnostic Test	PASS	09:48:09
Air Blank	0.000	09:48:46
Dry Standard 1	0.099	09:49:07
Air Blank	0.000	09:49:45
Subject Test 1	0.000	09:50:13
Num. Attempts	1	
Air Blank	0.000	09:51:11
Wait		09:55:15
Air Blank	0.000	09:55:52
Subject Test 2	0.000	09:56:13
Num. Attempts		
Air Blank	0.000	09:56:58
Dry Standard 2	0.099	09:57:19
Air Blank	0.000	09:57:58
Diagnostic Test	PASS	09:58:34
Air Blank	0.000	09:59:11

RESULTS

Subject Test 1: 0.000 g/210L
Subject Test 2: 0.000 g/210L

EXCEPTION MESSAGES

OPERATOR COMMENTS

SUBJECT TEST

No RFI Detected

Successfully Completed Test Sequence

Air Blank Results must be 0.000
Consecutive Subject Test Results must not differ by more than 0.020 g/210L
Standard Check results must be < 10%

Quick Breath Test Legal References

Admissibility –

- ARS § 28-1323(A) - Breath Test Admissibility Statute

Breath test results are admissible in any trial, action or proceeding with the following foundation:

- 1. A DPS approved device was used.
- 2. The operator was breath test certified on the instrument used.
- 3. Duplicate tests were administered and the test results were within 0.02 alcohol concentration of each other
- 4. The operator who followed the DPS checklist
- 5. The device used to conduct the test was in proper operating condition. (bracketing calibrations on the checklist, monthly calibration records, and/or standard quality assurance records.)
- Evidence Rule 702/*Daubert* (*Deason*). [Rarely used, but sometimes necessary.]

Courts cannot require more than the breath test statutory provisions to admit the breath test

- ARS § 28-1323(B) [Compliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result.]
- *See, State v. Duber*, 187 Ariz. 425, 930 P.2d 502 (App. 1996).
- *See, State v. Superior Court (Stock, RPI)*, 181 Ariz. 202, 888 P.2d 1389 (1995).

Records of periodic maintenance (calibration records, standard quality assurance records, maintenance records) that show the device was in proper operating condition are admissible and are public records.

- ARS § 28-1323(A)(5)

Potential jury instruction addressing records of periodic maintenance

The State has introduced evidence of periodic maintenance through records which show the Intoxilyzer 8000 breath testing device was in proper operating condition at a time before, after and at the time of the tests. Such records are *prima facie* evidence that the device was in the proper condition at the time of the tests.

Source: *State v. Peraza*, 239 Ariz. 140 (App. 2016); *State v. O'Haire*, 149 Ariz. 518 (App. 1986) and ARS 28-1321(A)(5).

The breath testing statute is not unconstitutional

- *State ex rel. Collins v. Seidel (Deason, Real Party in Interest)* 142 Ariz. 587, 691 P.2d 678 (1984).
- *State v. Leonard*, 151 Ariz. 1, 5, 725 P.2d 493 (App. 1986).

The fact that the source code, software, etc. is not available is not a basis for suppression

- ARS § 28-1323(C)
- ARS § 28-1388(B)

The State does not have to collect or preserve a second sample of the suspect's breath when duplicate tests are given.

- ARS § 28-1388(B)
- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

Testimony of the officer will generally satisfy 28-1321(A)(4) even if disputed by the defense. The deprivation period is a part of the checklist & officer testimony of officer is generally sufficient.

- *State v. King*, 213 Ariz. 632, 146 P.3d 1274 (App. 2006).

The breath test statute does not require the same officer to conduct the entire 15-minute deprivation period.

- *State v. Tyszkiewicz*, 209 Ariz. 457, 459 - 60, 104 P.3d 188 (App. 2005).

Lack of foundation objections – person objecting is required to indicate what is lacking.

- *State v. Rodriguez*, 186 Ariz. 240 (1996)
- *State v. Reidhead*, 22 Ariz.App. 420 (1974).

Defendant's refusal of breath (or blood) test is admissible and a question of fact for the jury. (The State should get a jury instruction).

- ARS § 28-1388(D)
- *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989).

Evidence of refusal is not testimonial evidence. The State may comment at trial and argue reasonable inferences.

- *State v. Superior Court (Ahrens, Real Party in Interest)*, 154 Ariz. 574, 578, 744 P.2d 675, 679 (1987).
- *South Dakota v. Neville*, 459 U.S. 553, 556 (1983).
- *Pennsylvania v. Muniz*, 496 U.S. 582 fn 19 (1990).
- ARS § 28-1388(D)

If the MVD Hearing Officer finds the suspect did not refuse the breath (or blood) test, that ruling is not admissible in any later proceeding - including a DUI trial.

- ARS § 28-1321(N)

Good opinions recognizing reliability of duplicate breath tests.

- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

Disagreements between expert witnesses go to the weight, not admissibility.

- *State v. Velasco*, (*Alday*, RPI), 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990).

Where there is a lack of unanimity in the scientific community on the accuracy of a breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." (Should apply to blood tests also.)

- *State v. Olivas*, 77 Ariz. 118, 267 P.2d 893 (1954).

Court cannot grant a Rule 20 motion for the so-called margin of error. (NOTE: There is no built in 10% margin of error).

- *State ex rel. McDougall v. Superior Court* (*Gurule*, Real Party in Interest), 178 Ariz. 544, 875 P.2d 203 (App. 1994).

Instructing the jury that “records of periodic maintenance are *prima facie* evidence that the breath test instrument was working properly” is appropriate and does not shift the burden.

- *State v. Peraza*, 239 Ariz. 140, 147, 366 P.3d 1030 (App. 2016).
- *State v. O'Haire*, 149 Ariz. 518, 521, 720 P.2d 119, 122 (App.1986).

Breath tests do not have to be collected within two hours. The State may retrograde breath test results administered outside the two-hour window to anytime within the two-hour window.

- *State ex rel. O'Neill v. Superior Court (Kankelfritz, Real Party in Interest)* 187 Ariz. 440, 441, 930 P.2d 517 (App. 1996).
- *State v. Claybrook*, 193 Ariz. 588, 590, 975 P.2d 1101 (App. 1998).

The State is not collaterally estopped from admitting breath test results during a retrial for 28-1381(A)(1) even where a jury previously found the defendant not guilty of violating 28-1381(A)(2).

- *State ex rel. McDougall v. Superior Court (Steen, Real Party in Interest)* 179 Ariz. 279, 877 P.2d 1351 (App. 1994).

Breath test records may be placed on computer storage and this duplicate is deemed an original and is admissible with proper certification.

- ARS § 28-1327
- Records obtained or maintained under ARS § 28-1327 are admissible in any trial, action or proceeding (ARS § 28-1323(D))

An Officer with reasonable suspicion of DUI may request a PBT prior to arrest

- ARS § 28-1322(A)